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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. [redacted] 1099

BANGOR AND AROOSTOOK RAILROAD COMPANY, ET AL., *Petitioners,*

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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No.

BANGOR AND AROOSTOOK RAILROAD COMPANY, ET AL., *Petitioners,*

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Petitioners pray that a writ of certiorari issue to review an order of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on February 28, 1969.

Opinions Below

The opinion of the District Court, delivered orally on May 28, 1968 and not officially reported, is set forth in Appendix A hereto. The February 28, 1969 opinion of the Court of Appeals, not yet officially reported, is set forth in Appendix B hereto.

Jurisdiction

The order of the Court of Appeals, set forth in Appendix C hereto, was entered on February 28, 1969. A timely peti-

tion for rehearing was denied on October 23, 1969, in an order set forth in Appendix D hereto.[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Is Section 8 of the Norris-LaGuardia Act applicable to a proceeding for an order temporarily restraining a strike allegedly in violation of the Railway Labor Act pending a hearing on a motion for preliminary injunction?

2. Assuming that the District Court erred in holding that Section 8 of the Norris-LaGuardia Act is inapplicable to such a proceeding for a temporary restraining order and, therefore, in not hearing evidence concerning compliance with Section 8 or determining whether a temporary restraining order should be issued under the circumstances despite noncompliance with Section 8, does such error prevent persons damaged by strikes in contemptuous violation of the temporary restraining order issued by the District Court from recovering their damages in a compensatory contempt proceeding?

Statute Involved

Section 8 of the Norris-LaGuardia Act, 47 Stat. 72, 29 U.S.C. § 108, provides that:

> "No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

[1] That order also disposed of certain other matters pending in the same dockets before the Court of Appeals which are not involved in this petition.

Statement of the Case

When steam-powered locomotives were replaced by diesels, the primary function of the locomotive firemen—firing the boilers—disappeared and such firemen generally were not needed for the safe and efficient operation of locomotives. Nevertheless, the collective bargaining agreements between the petitioner railroads and the respondent union continued to require that a fireman be used on most locomotives, at great cost to petitioners and ultimately to the public in the form of higher rates. In an effort to eliminate the wasteful overmanning resulting from that requirement and other obsolete work rules, petitioners in 1959 served respondent and other unions representing their operating employees with notice of proposals, pursuant to Section 6 of the Railway Labor Act (45 U.S.C. § 156), to change the existing agreements so as to do away with those work rules.[2]

The dispute resulting from those proposals and from counterproposals served by the unions was submitted to an *ad hoc* Presidential Railroad Commission for its investigation and recommendation. That Commission concluded that firemen generally are not needed for the safe and efficient operation of locomotives in freight and yard service, and recommended the abolition of rules requiring that firemen be so used (subject to certain protections for existing firemen), as did an emergency board appointed by the President pursuant to Section 10 of the Railway Labor Act (45 U.S.C. § 160). Although accepted by the railroads, the recommendations of the Commission and emergency board were rejected by the unions and all of the procedures of the Railway Labor Act applicable to a major dispute were exhausted without settling the dispute.[3] When the unions threatened

[2] The validity of those Section 6 proposals was upheld by this Court in *Locomotive Engineers* v. *B. & O. R. Co.*, 372 U.S. 284 (1963).

[3] Disputes over Section 6 proposals to change existing agreements commonly

a nationwide railroad strike, the Congress enacted Public Law 88-108 (77 Stat. 132) to prevent that disaster.

Under P.L. 88-108, the two most difficult issues in dispute —the issue as to the use of firemen and an issue as to the consist of train crews (*e.g.*, the number of brakemen to be used)—were submitted to compulsory arbitration by an arbitration board which was designated as Arbitration Board No. 282. Board 282 agreed with the Presidential Railroad Commission "that firemen-helpers are not so essential for the safe and efficient operation of road freight and yard diesels that there should continue to be either a national rule or local rules requiring their assignment on all such diesels." *Opinion of Neutral Members*, 41 Labor Arbitration 680, 688 (1963). In general, its Award modified the existing agreements and established new work rules whereby the use of firemen in freight and yard service could be reduced by approximately 90%, subject to certain protections for the existing firemen. The Award also established procedures whereby train crew consists could be reduced subject to protections for existing employees.[4]

Section 3 of P.L. 88-108 provided that the arbitration award should constitute "a complete and final disposition" of the issues submitted to arbitration. Section 4 provided, however, that the "award shall continue in force for such

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are referred to as "major" disputes in contrast to disputes over the interpretation or application of existing agreements which commonly are referred to as "minor" disputes. Minor disputes not settled by agreement are subject to compulsory arbitration by adjustment boards under Section 3 of the Act, 45 U.S.C. § 153, and a union may not validly strike over such disputes. *E.g., Locomotive Engrs.* v. *L. & N. R. Co.*, 373 U.S. 33 (1963). In major disputes, resort to self help such as strikes by the unions and lockouts by the carriers is permitted, but only after the exhaustion of procedures that "are purposely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute." *Railway Clerks* v. *Florida E.C.R. Co.*, 384 U.S. 238, 246 (1966). See, *e.g., Railroad Trainmen* v. *Terminal Co.*, 394 U.S. 369, 378 (1969), where those procedures are succinctly described.

[4] The validity of the Award was upheld in *Brotherhood of Loc. Fire. & Eng.* v. *Chicago, B. & Q. R. Co.*, 225 F. Supp. 11 (D.D.C., 1964), aff'd *per curiam*, 331 F.2d 1020 (D.C. Cir., 1964), cert. den., 377 U.S. 918 (1964).

period as the arbitration board shall determine in its award, but not to exceed two years from the date the award takes effect, unless the parties agree otherwise." Board 282 provided that its Award should continue in force for a period of two years from the effective date thereof, unless the parties agreed otherwise. This two-year period expired as of January 25, 1966 insofar as the crew-consist provisions of the Award were concerned and expired as of March 31, 1966 insofar as the fireman provisions of the Award were concerned.

A controversy arose between the railroads and the unions (except for the Brotherhood of Locomotive Engineers, which agreed with the position of the railroads) concerning the rules that would apply following expiration of the two-year period of the Award. In general, the railroads contended that their prior rules as modified under the Award would continue to apply until changed in accordance with the Railroad Labor Act, while the unions contended that the prior rules would automatically be restored to full force and effect and apply after expiration of the Award until changed in accordance with the Railway Labor Act. A separate, although related, controversy arose between the railroads and three of the unions—respondent, the Brotherhood of Railroad Trainmen ("BRT"), and the Order of Railway Conductors & Brakemen ("ORC&B")—as a result of proposals served by those unions while the Award was still in effect, purportedly pursuant to Section 6 of the Railway Labor Act, to adopt new work rules that in effect would have wiped out the reductions in overmanning that had been accomplished under the Award. In general, the carriers contended that such proposals were premature in that they could not validly be served until the two-year period of the Award expired, while the unions contended that they had a right to serve and bargain about such proposals during the period of the Award as well as thereafter.

These controversies first came before the courts in litigation brought by the railroads against the crew-consist unions, as the crew-consist provisions of the Award were the first to expire. With minor exceptions, the District Court upheld the position of the railroads in regard both to the rules in effect following expiration of the Award and to the prematurity of the Section 6 notices served during the period of the Award. *Akron & Barberton Belt R. Co.* v. *Brotherhood of R. Trainmen*, 250 F. Supp. 691 (D. D.C., 1966), supplemental opinions, 252 F. Supp. 207 (D. D.C., 1966), 253 F. Supp. 538 (D. D.C., 1966), 254 F. Supp. 306 (D. D.C., 1966). Similar rulings were made by the District Court in the subsequent litigation between petitioners and respondent following expiration of the fireman provisions of the Award. *Bangor and Aroostook R. Co.* v. *Brotherhood of Loc. F. & E.*, 253 F. Supp. 682 (D. D.C., 1966).

While the carriers sought and obtained temporary restraining orders against strikes by the crew-consist unions over the rules to be applied following expiration of the Award, those unions soon made clear that they did not intend to strike and the temporary restraining orders were allowed to expire without any further injunctive relief being sought or granted. On March 28, 1966, the District Court issued an order temporarily restraining respondent and its officers, among others, from striking "over any dispute as to the agreements, rules, regulations, interpretations, or practices to be applied by the plaintiffs or any of them upon the expiration of the period during which the Award by Arbitration Board No. 282 shall continue in force as an award," pending an April 4, 1966 hearing on the plaintiff railroads' motion for a preliminary injunction. That temporary restraining order was issued upon the basis of affidavits setting forth threats by top officers of respondent to strike if the prior rules were not restored to full force and effect when the fireman provisions of the Award expired.

Unlike the crew-consist unions, respondent did not deny that it intended to strike and it soon demonstrated that its threats were not idle. In the teeth of the temporary restraining order, respondent struck several of the railroads immediately after the fireman provisions of the Award expired at 12:01 A.M. on March 31, 1966.[5] Later that day, the District Court entered a Supplement to Temporary Restraining Order in which respondent and "all other persons" subject to the March 28, 1966 order were specifically "ordered to cease the said strikes and picketing that are now taking place," but respondent nevertheless continued its illegal strikes in direct violation of that order. Consequently, on April 2, 1966 following a hearing on an order to show cause, the District Court entered an order adjudging that respondent and its President (H. E. Gilbert) "are guilty of contempt of this Court in failing and refusing to comply with this Court's order of March 28, 1966, as supplemented by its order of March 31, 1966," and ordering that respondent "be fined in the sum of $25,000 and H. E. Gilbert be fined in the sum of $2500 if the said contempts have not been terminated by 12 o'clock noon, on April 3, 1966." When respondent continued to defy the District Court and prolonged the strikes beyond noon on April 3, 1966, the District Court issued a rule to show cause as to why the fines should not be increased but the strikes were terminated before action could be taken upon the rule to show cause, after midnight on April 4, 1966.

The parties agreed, with the approval of the District Court, to bypass the preliminary injunction stage and go directly to a final hearing of the merits upon the basis of a

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[5] The struck railroads included the Boston and Maine, the Central of Georgia, the Grand Trunk Western, the Illinois Central, the Missouri Pacific, the New Orleans Union Passenger Terminal, the Pennsylvania, the Portland Terminal, the Seaboard, the Spokane International, the Texas and Pacific, and the Union Pacific.

stipulation as to the facts and issues. Among other things, that stipulation provided that:

> "5. Whether the Norris-LaGuardia Act . . ., or any part thereof, may apply to the dispute involved in this proceeding [is one of the issues to be decided]. The parties contemplate that this issue is to be argued and decided in the trial on May 4, 1966 as a matter of law. If it should be determined that the Norris-LaGuardia Act or some part thereof as a matter of law may apply to the dispute involved in this proceeding, the parties contemplate that a subsequent trial or hearing will be held to determine whether the requirements of the Norris-LaGuardia Act have been complied with upon the basis of the evidence and other relevant circumstances brought before the Court at the subsequent trial or hearing."

In addition to generally agreeing with petitioners' position of the merits (see p. 6, *supra*), the District Court held Norris-LaGuardia in its entirety to be inapplicable (253 F. Supp., at 689) so no further hearing was held to determine whether Section 8 of that Act had been complied with by petitioners.

The judgment on the merits in the case between petitioners and respondent was entered by the District Court on May 12, 1966. Meanwhile, on April 29, 1966, petitioners filed a motion to assess the fines conditionally imposed in the April 2, 1966 contempt order and a motion to award compensatory contempt damages to the railroads that had been struck by respondent. An order assessing the coercive contempt fines was entered on June 15, 1966,[6] and the compensatory contempt proceeding was held in abeyance pending appeals from that order and from the judgment on the merits.

[6] *Bangor and Aroostook R. Co.* v. *Brotherhood of Loc. F. & E.*, 255 F. Supp. 476 (D. D.C., 1966).

While not consolidated, the appeals from the judgment on the merits in the crew consist case, the appeals from the judgment on the merits in the fireman case between petitioners and respondent, and the appeals from the order assessing the coercive contempt fines were argued *seriatim* before a single panel of the Court of Appeals. On May 12, 1967, that Court issued two opinions relating to those appeals. One opinion dealt only with the appeals from the order assessing the coercive contempt fines. It is reported as *Brotherhood of Loc. Fire. & Eng.* v. *Bangor & Aroostook R. Co.*, 380 F.2d 570 (D.C. Cir., 1967), and is referred to herein as the "Coercive Contempt Opinion." The second opinion dealt with the appeals from the judgments on the merits entered in both the crew-consist case and in the fireman case. As supplemented on July 31, 1967, it is reported as *Brotherhood of Railroad Trainmen* v. *Akron & B.B. R. Co.*, 385 F.2d 581 (D.C. Cir., 1967), and is referred to herein as the "Merits Opinion."

In its Coercive Contempt Opinion, the Court of Appeals rejected all attacks upon the coercive contempt fines except one. The exception was a holding that the District Court should have held an evidentiary hearing upon the issue of whether respondent and its president had complied, or were unable to comply, with the condition that the strikes be terminated by noon of April 3, 1966.[7] While remanding the proceeding for such a hearing, the Court of Appeals rejected contentions that the coercive contempt fines could not be assessed because, among other things, the underlying tempo-

[7] Petitioners had filed affidavits asserting that the strikes had not terminated until 12 hours or more after the deadline, and no opposing affidavits were filed. The District Court saw no need under those circumstances for an evidentiary hearing, but the Court of Appeals thought it "possible that counsel for appellant was urging a more absolute 'substantial compliance,' or an inability to comply, with the District Court's unconditional order to call off the strike and return to work," and held that respondent and Mr. Gilbert should be allowed an opportunity to present evidence supporting the assertions of their counsel. 380 F.2d, at 581-582.

rary restraining order violated Sections 4 and 8 of the Norris-LaGuardia Act. After expressing the view that the coercive contempt fines were enforceable even if the underlying restraining order was invalid, the Court stated that such "an analysis is not, however, critical or determinative in the case now before us, because we find that the Norris-LaGuardia Act does not apply to preclude these underlying temporary restraining orders" since that "Act will not apply to preclude injunctive relief in cases in which the acts to be enjoined are in violation of the Railroad Labor Act." 380 F.2, at 483. See, generally, 380 F.2d, at 580, 583-584.

In its Merits Opinion, the Court of Appeals generally affirmed the position of the carriers and the District Court that the work rules established under Award 282 continued to apply until changed in accordance with the Railway Labor Act (385 F.2d, at 587, 592-594, 607-612), but held that the Section 6 notices served during the period of the Award were not premature although certain of those notices were invalid (385 F.2d, at 594-605).[8] In its initial opinion of May 12, 1967, the Court did not discuss the Norris-LaGuardia issue. At the conclusion of that opinion (385 F.2d, at 605), the Court stated that the parties could "request supplemental rulings on any matters that have not been discussed in this opinion." The supplemental opinion of July 31, 1967 resulted from such requests, including requests by two of the crew-consist unions (BRT and ORC&B) that the Court pass upon the validity of the order temporarily restraining strikes by those unions.[9]

The railroads in the crew-consist case took the position

[8] Respondent had served three Section 6 proposals on or about November 15, 1965, identified as Notice No. 1, Notice No. 2 and Notice No. 3. Notice No. 1, which proposed the adoption of rules that once again would require the use of firemen on almost all locomotives, was held to be valid and bargainable, Notice No. 2 was held to be invalid, and issues going to the validity of Notice No. 3 had been stipulated out of the case.

[9] Respondent did not request such a ruling with respect to the temporary restraining order issued against it and had not attacked that order at any time

that any issues as to the validity of the temporary restraining order entered in that case were moot as that order had long since expired, no strikes occurred and no further injunctive relief was issued. The Court held, however, that the possibility of recovery on the bond if the order was erroneously issued prevented mootness, and went on to hold that Section 8 of Norris-LaGuardia was applicable and had not been complied with insofar as the order restrained the BRT although there was no failure to comply with Section 8 insofar as the order restrained the ORC&B.[10] 385 F.2d, at 613-614. According to the Court of Appeals, the decision of this Court in *Trainmen* v. *Chicago, R. & I.R. Co.*, 353 U.S. 30 (1957), established a "principle of accomodation" between Norris-LaGuardia and the Railway Labor Act which was to be applied separately to the various sections of Norris-LaGuardia rather than to the Act as a whole. 385 F.2d, at 613. Under that principle of accommodation as so applied, the Court concluded that Section 8 applies to restraints against violations of the Railway Labor Act even though Section 4 does not. 385 F.2d, at 613-614. But, it "may be that in a particular case the District Court might conclude that the imperatives of the Railway Labor Act override Section 8," and error in entering a restraining order because of non-compliance with Section 8 would not "excuse a contemptuous violation." 385 F.2d, at 614. Nevertheless, "the approach of the District Court . . . that Section 8 of the Norris-LaGuardia Act was completely inapplicable . . . was error." 385 F.2d, at 614.

A petition by respondent and its president for writ of

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in the Merits Case, apparently because the issue was raised in the Coercive Contempt Case.

[10] The distinction in the result as to the two unions apparently stemmed from the Court's holdings in the May 12, 1967 opinion (385 F.2d, at 598-599) that the Section 6 notices served by the BRT were not premature, so that the railroads had a duty to bargain about such notices even during the period of the Award, while the Section 6 notices served by the ORC&B were premature or invalid so that no such duty arose. See 385 F.2d, at 614.

certiorari to review the Coercive Contempt Opinion was denied with a notation that the case "is not yet ripe for review by this Court" in view of the remand of that matter to the District Court for further proceedings. 389 U.S. 327-328 (December 11, 1967). Petitions by both the railroads and the unions to review the Merits Opinion were also denied. 390 U.S. 923 (January 29, 1968).

All of the foregoing is now history, but it forms the background for the decision which we now seek to have reviewed. We have noted (p. 8, *supra*) that petitioners, on April 29, 1966, filed a motion for an award of compensatory contempt damages to the railroads struck by respondent upon expiration of the Award in violation of a temporary restraining order, and that proceedings upon that motion were held in abeyance pending the appeals as to the coercive contempt fines and as to the mertis. On February 5, 1968 respondent filed with the District Court a motion to dismiss the compensatory contempt proceeding on the ground that the ruling by the Court of Appeals in its Merits Opinion that the temporary restraining order against the BRT was erroneously issued also applied to the temporary restraining order issued against respondent. Petitioners pointed out that the Court of Appeals in its Coercive Contempt Opinion had upheld the validity of the temporary restraining order issued against respondent. The District Court, in a brief oral opinion, concluded that the "validity of the restraining order has been upheld" and compensatory damages could be awarded even if it were invalid in view of "the decision of the Supreme Court in the Mine Workers case to the effect that even an invalid injunction must be obeyed and failure to obey it is punishable as a contempt." App. A, at 29. The motion to dismiss the compensatory contempt proceeding was denied, therefore, in an order entered on May 29, 1968.

Respondent then filed with the Court of Appeals, in the dockets in which the Merits Opinion had been rendered, what it denominated as a Petition for Further Relief to Enforce this Court's Prior Opinion and Mandate. The contents of that petition demonstrated that it sought an extraordinary writ under the All-Writs Act, 28 U.S.C. § 1651, mandating the District Court to dismiss the compensatory contempt proceeding. The February 28, 1969 decision of the Court of Appeals, which is the subject of this petition, in effect granted that petition although the Court saw no reason to issue a formal mandate as it was confident that the District Court would proceed in accordance with the views expressed by the Court of Appeals in its opinion. App. B., at 33.

The Court of Appeals characterized its Coercive Contempt Opinion as holding "that a coercive contempt fine could stand even assuming the restraining order itself was beyond the jurisdiction of the District Court by virtue of the Norris-LaGuardia Act" (App. B, at 31), although conceding that "at one point there is general language" in the Opinion "that the Norris-LaGuardia Act did not preclude the restraining order against" respondent (App. B, fn. 3, at 32-33). The Court of Appeals then held that the "lack of propriety of the restraining order" against respondent "is established by" its Merits Opinion (App. B, at 31), although conceding that the "particular ruling came in the context of discussing the plea of BRT for recovery on their injunction bond . . ." (App. B, fn. 1, at 32). Thus, "the District Court had erred in granting injunctive relief to the carriers without regard to §8 of the Norris-LaGuardia Act in the mistaken belief that §8 was completely inapplicable" (App. B, at 32). According to the Court of Appeals, the "key mistake of the District Court lay in its assertion that there is no distinction between the right to impose a

coercive fine in order to enforce an injunction and the right to compensatory damages for its violation, and that in both respects failure to obey an invalid injunction is punishable as contempt" (App. B, at 33). That was error because, as the Court of Appeals viewed the decision of this Court in *United States* v. *Mine Workers,* 330 U.S. 258 (1947), "in a 'compensatory' civil contempt proceeding—unlike a coercive civil proceeding—the alleged contemnor establishes a defense if he successfully challenges the propriety of the underlying order" (App. B, at 31).

In a petition for rehearing, we urged, among other things, that petitioners at least should be given an opportunity to demonstrate compliance with Section 8, in view of the stipulation of the parties (see p. 8, *supra*) reserving that issue for further hearing in the event Section 8 was held to be applicable, and also to demonstrate that "the imperatives of the Railway Labor Act override Section 8" in the circumstances of this case—a possibility that the Court of Appeals appeared to recognize in its Merits Opinion (see p. 11, *supra*).[11] The petition for rehearing was denied without opinion, however, on October 23, 1969 (App. D).

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[11] We do not assert what we believe to be the error of the Court of Appeals in this regard as an independent ground for grant of certiorari, but we reserve the right to argue the issue in the event that certiorari is granted. The Court of Appeals stated (App. B, at 30) that respondent struck "on the ground that they had given an appropriate notice in 1965, to take effect after the expiration of Award 282, to increase the number of firemen above that provided by the Award," and petitioners "had refused to bargain over that notice contending that it was non-bargainable." Thus, the Court of Appeals apparently was of the view that the refusal to bargain over that Section 6 notice (Notice No. 1, see fn. 8 at p. 10, *supra*), established non-compliance with Section 8 of Norris-LaGuardia as that notice had been held to be bargainable in the Merits Opinion. But, as we pointed out in the petition for rehearing, petitioners contended that the strikes were over the refusal of the carriers to restore the prior rules upon expiration of the Award (an action upheld in the Merits Opinion), respondent contended the strike was over its Notice No. 3, and no one had contended and there was no evidence of record that the strikes were over Notice No. 1. Even if the strikes were over Notice No. 1, moreover, they violated the Railway Labor Act as the procedures of the Act had not been exhausted with respect to that Section 6 proposal. See fn. 3, pp. 3-4, *supra*.

Reasons for Granting the Writ

The background of the decision by the court below is fairly complex, but the issues raised by that decision are relatively simple. The proper decision of those issues is a matter of real importance, moreover, both to the parties and to the future administration of federal statutes having wide application and of federal contempt law. The decision below concerns the relationship between the Railway Labor Act and the Norris-LaGuardia Act and the even broader problem of the circumstances in which persons injured by actions in contempt of a restraining order or injunction may recover compensatory damages. In holding that each provision of Norris-LaGuardia is to be separately "accommodated" with the Railway Labor Act and that Section 8 of Norris-LaGuardia, at least, applies to proceedings to restrain violations of the Railway Labor Act, the decision below conflicts with decisions of this Court (and of other courts of appeals) holding the Norris-LaGuardia Act *in toto* to be inapplicable to such proceedings. And, the decision below that a technical error in the issuance of a temporary restraining order prevents recovery in compensatory contempt for deliberate violations of such an order goes beyond any holding of this Court (or any other court) of which we are aware. For these reasons, as more fully set forth in the following portion of this petition, we believe that certiorari should issue to review the decision of the Court of Appeals.

I. *The Relationship Between the Railway Labor Act and the Norris-LaGuardia Act.*

The Railway Labor Act (44 Stat. 577, as amended, 45 U.S.C. § 151 *et seq.*) regulates collective bargaining in the railroad and airline industries. The Norris-LaGuardia Act (47 Stat. 70, 29 U.S.C. § 101 *et seq.*), regulates the jurisdiction and proceedings of the federal courts when injunctive

relief is sought in connection with a labor dispute subject to that Act. Section 4 of Norris-LaGuardia (29 U.S.C. § 104) deprives the federal courts of jurisdiction to issue orders restraining or enjoining certain specified activities, including "[c]easing or refusing to perform any work or to remain in any relation of employment;" *i.e.*, strikes. If jurisdiction to issue such relief is not withdrawn by Section 4, Sections 7, 8 and 9 impose procedural requirements that must be complied with before a restraining order or injunctive relief may be issued. Section 7 (29 U.S.C. § 107) requires verified and specific allegations of certain facts, proof by testimony in open court, and findings of those facts by the trial court after a hearing of which due notice is given. Section 8 (29 U.S.C. § 108), with which we are particularly concerned here, provides that "no restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration." And, Section 9 (29 U.S.C. § 109) requires that the trial court make its findings prior to the issuance of any relief and that such relief be limited to specific acts alleged, proven and found.

Neither Act specifies what the relationship between them shall be. Thus, labor disputes arising under the Railway Labor Act are neither expressly subjected to Norris-LaGuardia nor expressly excepted from Norris-LaGuardia, either in whole or in part. This Court first passed upon the relationship between the two Acts in *Virginian Ry.* v. *Federation,* 300 U.S. 515 (1937). In affirming an injunction requiring a railroad to bargain with a union authorized to represent a craft of its employees pursuant to Section 2

Ninth of the Railway Labor Act (45 U.S.C. § 152 Ninth), the Court rejected a contention that the injunctive decree was invalid "for its failure to conform to the requirements of §9 of the Norris-LaGuardia Act," because:

> "It suffices to say that the Norris-LaGuardia Act can affect the present decree only so far as its provisions are found not to conflict with those of §2, Ninth, of the Railway Labor Act, authorizing the relief which has been granted. Such provisions cannot be rendered nugatory by the earlier and more general provisions of the Norris-LaGuardia Act."

300 U.S., at 562-563.

In *Graham* v. *Brotherhood of Firemen,* 338 U.S. 232, 237 (1949), this Court relied upon *Virginian Ry.*, which was said to hold "that the Norris-LaGuardia Act did not deprive federal courts of jurisdiction to compel compliance with positive mandates of the Railway Labor Act," in rejecting a contention that "in view of the provisions of the Norris-LaGuardia Act, 29 U.S.C. §§ 101 *et seq.*, the District Court was without jurisdiction to grant relief by injunction" requiring a union to represent the members of its craft in a non-discriminatory manner. The respondent union in that case (which is also the respondent here) had contended that the injunction was improper because the plaintiffs had not complied with Sections 7 and 8 of Norris-LaGuardia,[12] as well as relying upon Section 4 of that Act. The decision in *Graham* was followed in *Railroad Trainmen* v. *Howard,* 343 U.S. 768, 774 (1952), which held that "the District Court has jurisdiction and power to issue necessary injunctive orders" in a similar situation "notwithstanding the provisions of the Norris-LaGuardia Act."

This problem next came before the Court in *Trainmen* v.

[12] Brief for Respondent, at 16-17.

Chicago R. & I. R. Co., 353 U.S. 30 (1957), which affirmed an injunction against a strike over a minor dispute. That is the decision which the court below, in its Merits Opinion, relied upon as establishing a "principle of accommodation" which it purported to follow in holding that Section 8 of Norris-LaGuardia applies to proceedings to enforce the mandates of the Railway Labor Act even though Section 4 does not. See pp. 11, 13-14, *supra*. It is true that this Court stated, in *Trainmen*, that there "must be an accommodation" of the two Acts. 353 U.S., at 40. But the accommodation to which this Court referred did not involve picking and choosing among the various provisions of Norris-LaGuardia. Indeed, this Court in its *Trainmen* opinion did not single out for mention any particular provision of Norris-LaGuardia, much less analyze the various provisions in some attempt to determine which should apply and which should be disregarded. The accommodation which this Court made, relying upon the legislative history of Norris-LaGuardia (353 U.S., at 40-41) as well as its *Virginian Ry., Graham* and *Howard* decisions (353 U.S., at 41-42), was that "the specific provisions of the Railway Labor Act take precedence over the more general provisions of the Norris-LaGuardia Act," so that "the District Court has jurisdiction and power to issue necessary injunctive orders [to enforce compliance with the requirements of the Railway Labor Act] notwithstanding the provisions of the Norris-LaGuardia Act." 353 U.S., at 43 (bracketed insert in the original).

Our understanding of *Trainmen* is confirmed by subsequent opinions of this Court. Later in the same Term, the Court held that an arbitration provision in a collective bargaining agreement coming under the Labor-Management Relations Act could be specifically enforced despite noncompliance with Section 7 of Norris-LaGuardia. *Textile*

Workers v. *Lincoln Mills*, 353 U.S. 448, 457-459 (1957). After noting that Section 8 of Norris-LaGuardia indicates that the Act was intended to encompass arbitration, the Court nonetheless concluded that Norris-LaGuardia was inapplicable, relying in part by analogy upon the holdings in *Virginian Ry.* and *Graham* that "the Norris-LaGuardia Act does not deprive federal courts of jurisdiction to compel compliance with the mandates of the Railway Labor Act." 353 F.2d, at 458. In *Locomotive Engineers* v. *M.-K.-T R. Co.*, 363 U.S. 528, 531 (1960), the Court characterized the *Trainmen* case as holding that the injunctive relief granted did "not fall within the prohibitions of the Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.*, because of the superseding purposes of the Railway Labor Act. . . ." And, in *Locomotive Engrs.* v. *L. & N. R. Co.*, 373 U.S. 33 (1963), the Court relied upon the *Trainmen* decision in affirming an injunction against a strike over a minor dispute which had been decided by an adjustment board, stating that in *Trainmen* "this Court concluded that the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115, was not a bar to injunctive relief against strikes" over minor disputes which had been submitted to an adjustment board. 373 U.S., at 39.

Thus, before the *Trainmen* decision, in that decision and after that decision, this Court consistently has accommodated the Norris-LaGuardia and Railway Labor Acts by holding that Norris-LaGuardia is inapplicable to orders enforcing the requirements of the Railway Labor Act, including orders restraining strikes in violation of that Act.[13] The Court has applied this "principle of accommodation,"

[13] On the other hand, if no violation of the Railway Labor Act is involved, the fact that the labor dispute is between parties subject to that Act does not prevent Norris-LaGuardia from applying. Thus, when the procedures prescribed by the Railway Labor Act in a major dispute have been exhausted, Norris-LaGuardia may apply to a suit to enjoin a strike over that dispute. *Telegraphers* v. *Chicago, & N. W. R. Co.*, 362 U.S. 330 (1960); *Trainmen* v. *Toledo, P. & W. R. Co.*, 321 U.S. 50 (1944).

moreover, to Norris-LaGuardia as a whole, and thus has held the procedural requirements of Sections 7, 8 and 9 to be inapplicable as well as the provisions of Section 4. Contrary to the decision by the court below, at no time has this Court even so much as suggested that a distinction may be made in this regard between the various provisions of Norris-LaGuardia.[14]

We see no need to detail the lower court decisions which, in compliance with the decisions of this Court, have held generally that Norris-LaGuardia does not apply in proceedings to enforce the mandates of the Railway Labor Act, without purporting to distinguish between the various provisions of Norris-LaGuardia. We do note, however, that *Brotherhood of Railroad Train.* v. *Denver & R. G. W. R. Co.*, 290 F.2d 266 (10th Cir., 1961), cert. den., 366 U.S. 966 (1961), expressly held Section 8 of Norris-LaGuardia to be inapplicable and thus undoubtedly is in direct conflict with the decision below in this case. The Tenth Circuit stated, in this regard (290 F.2d, at 270), that:

> "It is urged that the injunction entered in this case is prohibited by Section 8 of the Norris-LaGuardia Act. . . . We think this question was answered in the [*Trainmen* decision by the Supreme Court], in which it was held that the general terms of the Norris-LaGuardia Act could not be read alone in matters dealing with railway labor disputes, and that it did not prevent injunctions to prohibit strikes growing out of minor disputes which were specifically dealt with in the Railway Labor Act."

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[14] And, of course, in connection with an application for a temporary restraining order, a showing that a violation of the Railway Labor Act *may* be involved is sufficient to avoid the application of Norris-LaGuardia since a "District Court unquestionably [has] the power to issue a restraining order for the purpose of preserving existing conditions pending a decision upon its jurisdiction." *United States* v. *Mine Workers*, 330 U.S. 258, 290 (1947).

Accord, *Brotherhood of Railroad Carmen* v. *Chicago & N.W. Ry. Co.*, 354 F.2d 786, 789-796 (8th Cir., 1965).[15] See, also, *Piedmont Aviation, Inc.* v. *Air Line Pilots Ass'n, Internat'l*, 416 F.2d 633, 638 (4th Cir., 1969), petition for certiorari pending, No. 995 (O.T. 1969).

Indeed, we believe that a fair reading of the Coercive Contempt Opinion by the court below will lead to the conclusion that that court there held that Norris-LaGuardia was totally inapplicable to the order temporarily restraining respondent from striking over the rules to be applied following the expiration of Award 282, despite the contrary reading given to that opinion by the court below in the decision now sought to be reviewed. See pp. 9-10, 13, *supra*. Certainly, respondent (as well as petitioners) so construed the Coercive Contempt Opinion at the time. In its petition to this Court for writ of certiorari to review that decision (No. 353, O.T. 1967), respondent here asserted (pp. 25-33) that the court below erred in holding that Sections 7 and 8, as well as Section 4, of Norris-LaGuardia were inapplicable, and indeed, that "the worst violation of Norris-LaGuardia" was the "disregard of Section 8" (p. 30).

But however that may be, we submit that the decision below in this case conflicts with decisions of this Court and of other courts of appeals. The clear line of demarcation between the Railway Labor Act and the Norris-LaGuardia

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[15] In its Merits Opinion, the court below cited the *Carmen* case as supporting its approach to Norris-LaGuardia. 385 F.2d, at 613, fn. 4. But while noting in that case that "even if the Norris-LaGuardia Act were held to apply . . ., it is arguable that at least the requirements of §8 had been met by the carrier" (354 F.2d, at 794, fn. 8), the Eighth Circuit held that "the more specific and later-enacted Railway Labor Act must prevail to allow the issuance of the injunction" (354 F.2d, at 796) even if the carrier did not comply with the procedural requirements of Sections 7, 8 or 9 of Norris-LaGuardia. An examination of the other decisions cited by the court below in that footnote to its Merits Opinion will reveal that only *Rutland Railway Co.* v. *Brotherhood of Locomotive Eng.*, 307 F.2d 21 (2d Cir., 1962), cert. den., 372 U.S. 954 (1963), lends support to its approach to Norris-LaGuardia.

Act heretofore drawn by this Court will be obscured if that decision is left standing so as to afford warrant for a separate and diverse "accommodation" of each provision of Norris-LaGuardia even in circumstances where enforcement of the mandates of the Railway Labor Act is involved, rather than disregarding Norris-LaGuardia in its entirety in such circumstances. If such a change in approach is to be adopted and the ability of the federal courts to enforce the Railway Labor Act is to be so eroded, that determination should be made by this Court after full consideration of all the relevant arguments.

We note that the petition for writ of certiorari filed by the railroads involved in the crew-consist aspect of the Merits Opinion by the court below (most of whom are also petitioners here) sought review of the holding that Section 8 of Norris-LaGuardia applied to the temporary restraining order against the BRT, asserting reasons that generally are similar to those asserted above. See Petition, No. 863, O.T. 1967, at 27-32. We do not know, of course, why the Court denied that petition. It may have been because, as was admitted in the petition (p. 32), the decision in that case had "little immediate importance to the parties" as it involved at most a nominal recovery on the injunction bond. See pp. 6-7, 11, *supra*. Here, the damages recoverable in compensatory contempt have not yet been proven, but are expected by petitioners to be very substantial. Moreover, the Norris-LaGuardia issue in the prior case may have been largely submerged by the issues relating more directly to P.L. 88-108 and the effect of the expiration of Award 282 which were raised in that petition and the related petitions. And, of course, at that time the seeming inconsistencies between the lower court's Coercive Contempt Opinion and its Merits Opinion, insofar as the accommodation of the Norris-LaGuardia and Railway Labor Acts is concerned, had not been

resolved so that this Court may have been uncertain as to where the lower court stood on that issue. But whatever the explanation may be, we remain convinced that the issue now presented is deserving of review and must ultimately be resolved by this Court.

II. *Recovery of Compensatory Contempt Damages.*

Assuming that the court below was correct in holding that the trial court erred in issuing the temporary restraining order violated by respondent, we believe that the court below was wrong in holding that the trial court's error prevents petitioners from recovering compensation in a compensatory contempt proceeding for losses caused by respondent's strikes in contemptuous violation of that restraining order. In so holding, the court below misconstrued this Court's decision in *United States* v. *Mine Workers*, 330 U.S. 258 (1947), and erected barriers to the recovery of compensatory contempt damages that are not justified by that case or by reason. If that decision is left standing, the inevitable result will be to encourage persons to violate judicial orders in the belief that even a correctable technical error in the issuance of such orders will be sufficient in itself to prevent any recovery in compensatory contempt by persons injured as a result of such contemptuous conduct.

According to the Court of Appeals, the trial court's error in temporarily restraining respondent from striking over the rules in effect following the expiration of Award 282 was the trial court's "mistaken view that §8 [of Norris-LaGuardia] is completely inapplicable." App. B, at 32. The Court of Appeals reaffirmed its view, initially asserted in its Merits Opinion (385 F.2d, at 613), that this error was not "jurisdictional" so as to deprive the trial court of jurisdiction to issue injunctive relief. App. B, at 32. The Court of Appeals did not repudiate its holdings in its Merits Opinion rejecting respondent's contention on the merits that the

rules in effect prior to Award 282 automatically were restored to full force and effect upon the expiration of the Award (385 F.2d, at 592-594, 608-612), and that "in a particular case the District Court might conclude that the imperatives of the Railway Labor Act override Section 8" of Norris-LaGuardia and issue a temporary restraining order even though Section 8 has not been complied with. Moreover, petitioners have never had the opportunity to demonstrate compliance with Section 8 contemplated by their stipulation with petitioner to the effect that the trial court initially would decide as a matter of law whether any part of Norris-LaGuardia was applicable and a subsequent trial on the compliance issue would be had if some part of that statute were held to be applicable. See p. 8, *supra*.

Nevertheless, the Court of Appeals held that the nonjurisdictional error of the trial court in holding that "§8 was completely inapplicable" in itself prevents recovery by petitioners in compensatory contempt, in the belief that this result was required by the *Mine Workers* decision. App. B, at 31-33.

In *Mine Workers*, the union had struck in violation of a temporary restraining order issued at the instance of the United States after the coal mines had been seized by the Government. The trial court found the union and its president guilty of criminal and civil contempt, and imposed criminal contempt fines in the amount of $3,500,000 as to the union and $10,000 as to its president. In affirming except for a reduction of the fine imposed on the union, this Court held that Section 4 of Norris-LaGuardia did not deprive the District Court of jurisdiction to issue the temporary restraining order as that Act does not apply to the United States (330 U.S., at 269-289) and, in the alternative, that criminal contempt sanctions could properly be imposed for violation of the restraining order even if the trial court was

without jurisdiction to issue that order by reason of Section 4 of Norris-LaGuardia (330 U.S., at 289-295).

In the course of justifying its holding on the latter point, this Court stated (330 U.S., at 294-295) that:

> "It does not follow, of course, that simply because a defendant may be punished for criminal contempt for disobedience of an order later set aside on appeal, that the plaintiff in the action may profit by way of a fine imposed in a simultaneous proceeding for civil contempt based upon a violation of the same order. The right to remedial relief falls with an injunction which events prove was erroneously issued, *Worden* v. *Searls*, [121 U.S. 14,] at 25, 26 [(1887)]; *Salvage Process Corp.* v. *Acme Tank Cleaning Process Corp.*, 86 F.2d 727 (1936); *S. Anargyros* v. *Anargyros & Co.*, 191 F. 208 (1911); [footnote omitted] and *a fortiori* when the injunction or restraining order was beyond the jurisdiction of the court."

The above-quoted *dictum* is the apparent basis for the belief of the court below that *Mine Workers* compelled its holding that petitioners could not recover in compensatory contempt because the trial court erred in its view that Section 8 of Norris-LaGuardia was completely inapplicable. But, an examination of the cases cited in the above quotation reveals that they involved situations in which it was subsequently established that an injunction should have been denied on the merits rather than because of some correctable procedural or evidentiary irregularity.[16] And, we believe that it is to such situations that this Court referred in stat-

[16] Of the cases cited, *Worden* itself determined that the injunction could not be sustained on the merits, the opinion on the merits in the *Salvage Process* case is reported at 86 F.2d 725, and the opinion on the merits in the *S. Anargyros* case is reported at 167 Fed. 753. The cases cited in the footnote omitted from the above-quotation from *Mine Workers* apparently were cited for *dicta* and did not directly involve recovery in compensatory contempt.

ing that the "right to remedial relief falls with an injunction which events prove was erroneously issued. . . ." This is indicated not only by the cases cited for that proposition, but also by the statement later in *Mine Workers* (330 U.S., at 304) that:

> "Where compensation is intended, a fine is imposed, payable to the complainant. Such fine must of course be based upon evidence of complainant's actual loss, and his right, as a civil litigant, to the compensatory fine is dependent upon the outcome of the basic controversy [citing in fn. 81 the above-quoted discussion at pp. 294-295 of 330 U.S.]."

The "outcome of the basic controversy" here rejected respondent's contention that the prior rules should be restored to full force and effect when Award 282 expired, so that strikes intended to coerce the restoration of those rules were illegal and recovery by petitioners for the damages caused by such illegal strikes truly would constitute "compensation" rather than an undeserved "profit."

We suggest that it is one thing to say that a party cannot collect compensatory damages for violations of a restraining order or injunction that the trial court had no jurisdiction to enter or that was unsupportable on the merits, and quite another thing to say that the same result obtains where the error was of a non-fatal character that could have been rectified by the trial court and that did not preclude the entry of a permanent injunction. The pressures of time under which temporary restraining orders are issued, particularly where a strike is involved, generally are severe, and it is not surprising that a trial court may not always be able to anticipate every possible objection or to avoid technical errors. We suggest that, so far as compensatory damages are concerned, the burden on the injured party should be no greater

than to establish that, had the trial court anticipated every possible issue and had it applied the appropriate governing principles, the restraining order could have issued, and issued properly. Assuming that the holding by the Court of Appeals in regard to the applicability of Section 8 of Norris-LaGuardia was correct, petitioners at least should have an opportunity to demonstrate that the temporary restraining order nevertheless could properly have been issued by proving either that they complied with Section 8 or that "the imperatives of the Railway Labor Act" overrode the requirements of Section 8 in the circumstances that existed when the restraining order was issued. Petitioners should not be forever precluded from recovering in compensatory contempt for damages caused by strikes in violation of the restraining order solely because of the trial court's assumed error in considering such proof to be unnecessary. Certainly, the *Mine Workers* decision is not to the contrary, the cases cited in *Mine Workers* for the *dictum* relied upon below are not to the contrary, and we do not know of any other decision denying recovery in compensatory contempt because of an error of the kind found by the court below to have been committed by the trial court in issuing the underlying restraining order. If such a far-reaching doctrine is to be established, it should be established by this Court after due consideration of all the factors that may be involved.

Consequently, we believe that the decision below on this issue also deserves review by this Court and that certiorari should be granted for that purpose as well as to review the holding on the relationship between the Norris-LaGuardia and Railway Labor Acts.

Conclusion

For the reasons stated above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the District Court*

The Court: This Court is of the opinion that a distinction cannot be drawn between the right to impose a coercive fine in order to enforce an injunction or a restraining order and the right to compensatory damages for its violation.

The validity of the restraining order has been upheld. Even if it was invalid there would be recourse to the decision of the Supreme Court in the Mine Workers case to the effect that even an invalid injunction must be obeyed and failure to obey it is punishable as a contempt.

In view of these circumstances the motion to dismiss the compensatory contempt proceeding is denied.

APPENDIX B

OPINION OF THE COURT OF APPEALS

On Appellant's Petition for Further Relief To Enforce the Court's Prior Opinion and Judgment

Decided February 28, 1969

Mr. Joseph L. Rauh, Jr. with whom *Messrs. John Silard, Daniel H. Pollitt, Isaac N. Groner, David Epstein, Stephen E. Moss* and *Alex Elson,* were on the petition, for appellant.

Mr. Richard T. Conway, with whom *Messrs. Francis M. Shea* and *William H. Dempsey, Jr.,* were on the opposition to the petition, for appellees.

Before: DANAHER,* BURGER and LEVENTHAL, *Circuit Judges.*

PER CURIAM: In this case we grant the petition filed by Brotherhood of Locomotive Firemen and Enginemen (BLFE) for a ruling concerning the intention and effect of our previous rulings in the railroad work rules litigation.

It suffices for present purposes to recall that an action was filed on March 24, 1966, by the nation's railroads against BLFE (Firemen), concerning the situation that would confront the nation with the expiration on March 31, 1966, of the fireman-manning Award of Arbitration Board 282. The Firemen were to strike on the ground that they had given an appropriate notice in 1965, to take effect after the expiration of Award 282, to increase the number of firemen above that provided by the Award. The railroad had refused to bargain over that notice, contending that it was non-bargainable. They obtained a temporary restraining order on March 28, against strikes by the BLFE over any dispute as to the rules to be applied by the carriers after the expiration of that period. The BLFE struck certain carriers the morning of March 31, and these strikes were specifically enjoined by a supplement to the temporary restraining order entered that day. The strike terminated on April 3. On April 29 the carriers filed two motions—one for an order

* Circuit Judge Danaher became Senior Circuit Judge on January 23, 1969.

awarding compensatory damages for contempt, and one for an order assessing a fine as a coercive penalty for failure to terminate the contempt.

The "coercive contempt" matter came before us in No. 20316, wherein this court overruled BLFE's effort to interpose a defense based on the invalidity of the restraining order under the Norris-LaGuardia Act. *BLFE v. Bangor & Aroostook R.R. Co.*, 127 U.S.App.D.C. 23, 380 F.2d 570 (1967). The court held that a coercive contempt fine could stand even assuming the restraining order itself was beyond the jurisdiction of the District Court by virtue of the Norris-LaGuardia Act. It held the doctrine of *United States v. United Mine Workers*, 330 U.S. 258 (1947), which allows alleged contemnors to challenge the propriety of the underlying order in defense of an otherwise contemptuous disobedience to be a "directive in regard to, the right of defendants in criminal and *compensatory* civil contempt proceedings," but declared that "prospective, coercive fines should be enforceable despite a subsequent determination by the District Court, or on appeal, that the disregarded order was in fact beyond the ordering court's jurisdiction." *See* 127 U.S.App.D.C. at 36, 380 F.2d at 583.

That coercive contempt case, however, is not the subject of our present consideration. In the opinion cited above this court remanded to provide a trial to defendants on a contested issue, and that proceeding is in the bosom of the court. What we are concerned with is the other motion filed by the carriers, for compensatory damages. The District Court declined to dismiss the compensatory contempt proceeding. We think appellants are entitled to relief declaring that such dismissal is a corollary that follows from the rulings of this court on the merits.

In No. 20316, as noted above, this court (following *Mine Workers*) pointed out that in a "compensatory" civil contempt proceeding—unlike a coercive civil proceeding—the alleged contemnor establishes a defense if he successfully challenges the propriety of the underlying order.

The lack of propriety of the restraining order is established by this court's ruling on the merits in No. 20152 et al. *See* opinion of May 12, 1967, and supplemental opinion of

July 31, 1967, reported together *sub nom. Brotherhood of Railroad Trainmen v. Akron & Barberton Belt R.R. Co.*, 128 U.S.App.D.C. 59, 385 F.2d 581 (1967), *cert. denied*, 390 U.S. 923 (1968). In the May 12 opinion this court held, reversing the District Court, that there had been an unlawful refusal by the carriers to bargain with the firemen. In the July 31 opinion we held[1] that the District Court had erred in granting injunctive relief to the carriers without regard to § 8 of the Norris-LaGuardia Act,[2] in the mistaken view that § 8 was completely inapplicable. Section 8 provides that a federal court shall not grant a restraining order in a labor dispute where the complainant "has failed to comply with any obligation imposed by law which is involved in the labor dispute in question." We said (128 U.S.App.D.C. at 91-92, 385 F.2d at 613-14):

> The District Court erred in concluding that because it held, correctly, that the action was not subject to Section 4 of the Norris-LaGuardia Act, which would have ousted the court of jurisdiction, it necessarily followed that the "clean hands" provision of Section 8 of the Norris-LaGuardia Act was likewise wholly inapplicable. * * * In saying that the restraining order was erroneously entered, however, we do not mean that would excuse a contemptuous violation.

The last sentence quoted related to the earlier ruling in No. 20316 that the irregularity of the injunction would not provide a defense in a coercive contempt proceeding. And the July 31 ruling specifically affirmed and adhered to the ruling in No. 20316—by the same panel—that the District Court was correct in holding that it had jurisdiction to enjoin a violation of the Railway Labor Act, and that this jurisdiction was not negatived by § 4 of the Norris-LaGuardia Act.[3] *See* 128 U.S.App.D.C. at 91, 385 F.2d at 613.

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[1] The particular ruling came in the context of discussing the plea of BRT for recovery on their injunctive bond, but no one contends there is any meaningful difference between the unions in regard to the question at bar. This court assumed that the District Court would issue rulings applying and implementing the decision of this court.

[2] *See* 29 U.S.C. § 108 (1964).

[3] Though at one point there is general language in No. 20316 that the Norris-

However, as noted, the District Court acted improperly in the exercise of its jurisdiction when it did not heed the "clean hands" provision of § 8 of that law.

The key mistake of the District Court lay in its assertion that there is no distinction between the right to impose a coercive fine in order to enforce an injunction and the right to compensatory damages for its violation, and that in both respects failure to obey an invalid injunction is punishable as a contempt.[4] That that is error is clear from the rulings already quoted. The invalidity of the order is no bar to a proceeding that vindicates a public right, the authority of the court. However the railroads' right to compensation depends on their establishing a private right, to the injunctive relief, and in this case that right was negatived by their own unlawful refusal to bargain on BLFE's notice of a proposed change in manning work rules.

A question arises as to the appropriate form of relief. While in some cases mandamus has been used,[5] we see no occasion to think in terms of formal mandates. The District Court is, we are confident, fully concerned to provide the fresh outlook of settling disputes between unions and railroads in furtherance of the Congressional objective of agreement and harmony.[6] It is for that reason that we think this an appropriate case to clarify the intention of our prior rulings, and pull out from the litigation a thorn that might otherwise fester. It suffices for that purpose to issue this opinion which will in due course be transmitted to the District Court.[7]

Petition Granted.

LaGuardia Act did not preclude the restraining order against BLFE, it is clear from several places in context that what this court was troubled by and focused on was the claim that defendants were being fined for violating an order that was beyond the jurisdiction of the District Court. Even this is no defense in a coercive contempt proceeding, as noted above, but it was reassuring that the District Court did in fact have jurisdiction notwithstanding § 4. In exercising that jurisdiction, it was required to observe the clean hands provision of § 8.

[4] *See* Tr. May 28, 1968, p. 62.

[5] *See* Federal Home Loan Bank v. Hall, 225 F.2d 349, 385 (9th Cir. 1955), *cert. denied*, 350 U.S. 968 (1957).

[6] *See* 128 U.S.App.D.C. at 82-83, 385 F.2d at 604-5.

[7] *Cf.* S.S. Kresge Co. v. Winget Kickernick Co., 102 F.2d 740 (8th Cir.), *cert. denied*, 308 U.S. 557 (1939).

APPENDIX C

ORDER OF THE COURT OF APPEALS

Before: Danaher,* Burger and Leventhal, Circuit Judges.

ORDER

On consideration of the petition of Brotherhood of Locomotive Firemen and Enginemen for further relief to enforce this Court's prior opinion and judgment, and of the responsive pleadings filed with respect thereto, and after hearing argument by counsel, it is

ORDERED AND ADJUDGED by this Court that the aforesaid petition is hereby granted to the extent set forth in the opinion of this Court filed herein this date.

Per Curiam.

Dated: February 28, 1969.

Opinion per curiam.

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* Circuit Judge Danaher became Senior Circuit Judge on January 23, 1969.

APPENDIX D

ORDER OF THE COURT OF APPEALS*

Before: Danaher, Senior Circuit Judge, Leventhal and Robb, Circuit Judges; in Chambers

ORDER

The Clerk is directed to file all of the responsive pleadings lodged with respect to the following:

The motion of Bangor and Aroostook Railroad Company, et al. to terminate the stay of further proceedings;

The petition of Bangor and Aroostook Railroad Company, et al. for rehearing of the opinion and order of February 28, 1969;

The motion of Bangor and Aroostook Railroad Company, et al. to recall the mandate and to clarify the opinion and judgment;

The motions of the Brotherhood of Locomotive Firemen and Enginemen for interim injunctive relief and for immediate oral argument thereon.

On consideration of the foregoing motions and responsive pleadings, it is

ORDERED by the Court that the stay of further proceedings in the above entitled cases heretofore ordered on April 23, 1969 is hereby terminated, and it is

FURTHER ORDERED by the Court that the petition of Bangor and Aroostook Railroad Company, et al. for rehearing, is denied, and it is

FURTHER ORDERED by the Court that the motion of Bangor and Aroostook Railroad Company, et al. to recall the mandate and to clarify the opinion and judgment is denied, and it is

FURTHER ORDERED by the Court that the motions of Brotherhood of Locomotive Firemen and Enginemen for interim injunctive relief and for immediate oral argument thereon, are denied.

* Filed October 23, 1969.

The Court is of the view that the case does not warrant revision of its outstanding opinions or mandates, and that the interpretation and application of these opinions to the fact situations now presented should be determined by the District Court in the first instance. The District Court has continuing jurisdiction to hear and rule on requests for interim or permanent injunctive relief.

Per Curiam.

(8782-5)